

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEPHEN LIEBB,

Plaintiff,

v.

C. DALY, BPT COMMISSIONER,

Defendant.

No. C 04-00950 CW

ORDER GRANTING  
DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT  
(Docket # 44)

Plaintiff Stephen Liebb, an inmate incarcerated at San Quentin State Prison for first degree murder, brings this civil rights complaint under 42 U.S.C. § 1983 seeking injunctive and declaratory relief for violation of his right to due process at his July 17, 2003 hearing before the Board of Prison Terms (Board).<sup>1</sup> Defendant moves for summary judgment on the ground that Plaintiff's due process claim is barred by the doctrine of res judicata. Having considered all of the papers filed by the parties, the Court GRANTS Defendant's motion for summary judgment.

BACKGROUND

Many of the facts relevant to this motion are set forth in the Court's March 17, 2009 Order Denying Defendant's Motion for Judgment on the Pleadings. (Docket # 43). In that motion, Defendant argued that res judicata barred Plaintiff's civil rights complaint based on the prior federal judgment denying Plaintiff's

<sup>1</sup>The Board of Prison Terms was abolished effective July 1, 2005, and replaced with the Board of Parole Hearings. Cal. Penal Code § 5075(a).

1 petition for writ of habeas corpus. In its March 17, 2009 Order,  
2 the Court concluded that because, in denying the federal petition,  
3 it had to review deferentially Plaintiff's state habeas judgment  
4 under the Antiterrorism and Death Penalty Act (AEDPA), the judgment  
5 denying the federal petition was not a judgment on the merits  
6 within the meaning of the doctrine of res judicata and thus  
7 Plaintiff's civil rights complaint was not barred. March 17, 2009  
8 Order at 10-11.

9 In her present motion for summary judgment, Defendant argues  
10 that res judicata bars the litigation of Plaintiff's civil rights  
11 claim based on the state judgments that denied his state habeas  
12 petitions, which were final judgments on the merits within the  
13 meaning of res judicata.

14 Plaintiff filed state habeas petitions in the state superior,  
15 appellate and supreme courts. In Plaintiff's petition in the  
16 superior court, he asserted only that the Board's decision violated  
17 his federal constitutional right to due process because the  
18 decision was not supported by "some evidence." In a reasoned  
19 decision, the superior court denied the petition, holding that the  
20 Board's findings were supported by "some evidence." In his habeas  
21 petition in the California court of appeal, Plaintiff asserted the  
22 same claim that the Board's decision was not supported by "some  
23 evidence" and added the allegation that the Board "denies due  
24 process and fails to act impartially by denying parole to  
25 approximately ninety-eight percent of inmates." Def's. Req. for  
26 Judicial Notice, Ex. C. at 7, 48. The appellate court summarily  
27 denied this petition. In Plaintiff's petition for review in the  
28 California Supreme Court, he again asserted the claim that the

1 Board violated his due process rights by making its decisions  
2 without the support of "some evidence" and included the allegation  
3 that the Board violates "Due Process in using the crime as the  
4 primary factor to deny parole and routinely characterizing murders  
5 as being 'particularly cruel and egregious' without undertaking a  
6 comparison of the applicant's crime to other offenses of the same  
7 type." Def's. Req. for Judicial Notice, Ex. E at 5. The  
8 California Supreme Court summarily denied the petition for review.

9 In his civil rights complaint here, Plaintiff asserts that the  
10 Board violated his due process rights by arbitrarily and  
11 capriciously characterizing virtually every murder as heinous and  
12 cruel in order to justify a finding of parole unsuitability.<sup>2</sup>

#### 13 LEGAL STANDARD

14 Summary judgment is properly granted when no genuine and  
15 disputed issues of material fact remain, and when, viewing the  
16 evidence most favorably to the non-moving party, the movant is  
17 clearly entitled to prevail as a matter of law. Fed. R. Civ. P.  
18 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
19 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.  
20 1987).

21 The moving party bears the burden of showing that there is no  
22 material factual dispute. Therefore, the court must regard as true  
23 the opposing party's evidence, if supported by affidavits or other  
24 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815

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25  
26 <sup>2</sup>Defendant objects to the declaration of Keith Watley  
27 submitted in opposition to Defendant's motion for summary judgment.  
28 The facts asserted in the declaration are not relevant to this  
motion, which focuses solely on whether res judicata applies to the  
state habeas judgments. Defendant's objection is sustained.

1 F.2d at 1289. The court must draw all reasonable inferences in  
2 favor of the party against whom summary judgment is sought.  
3 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
4 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d  
5 1551, 1558 (9th Cir. 1991).

6 DISCUSSION

7 I. Untimely Affirmative Defense

8 Plaintiff argues that the defense of res judicata based upon  
9 the state habeas judgments was not timely raised. Rule 8(c) of the  
10 Federal Rules of Civil Procedure provides that, in responding to a  
11 pleading, a party must state any affirmative defense. However, the  
12 Ninth Circuit has held that a defendant may raise an affirmative  
13 defense for the first time on a motion for summary judgment if it  
14 does not cause prejudice to the plaintiff. Magana v. Commonwealth  
15 of the Northern Mariana Islands, 107 F.3d 1436, 1446 (1997). The  
16 plaintiff suffers prejudice from the late assertion of an  
17 affirmative defense when it causes delay in the proceedings or  
18 requires additional discovery. Owens v. Kaiser Foundation Health  
19 Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001). Prejudice is not  
20 measured by litigation expenses incurred before the affirmative  
21 defense is proffered. Id. Undue delay, by itself, is insufficient  
22 to cause prejudice. Id. at 712-13.

23 Plaintiff argues that he is prejudiced by Defendant's motion  
24 because she waited two years after filing her answer and after  
25 losing two motions for judgment on the pleadings before raising for  
26 the first time the defense of res judicata based on the state court  
27 judgments. Plaintiff states that, as a prisoner, he has limited  
28 resources to prosecute his case and "has languished in prison for

1 nearly five years since filing his original complaint--and two  
2 years since Defendant has filed her answer--due solely to  
3 Defendant's discovery delays and her filing of multiple motions on  
4 the same or similar legal theories."

5 Plaintiff has not suffered the type of prejudice that would  
6 warrant preclusion of the affirmative defense of res judicata.  
7 First, the assertion of the defense has caused no delay because the  
8 case has not yet been set for trial and discovery has not closed.  
9 Furthermore, under Owens, prejudice is not measured by expense  
10 incurred before an affirmative defense is raised. Plaintiff  
11 submits no authority for his theory that he is prejudiced because  
12 he is a prisoner or because he has been in prison for five years  
13 since he filed this lawsuit, especially in light of the fact that  
14 this civil rights action does not seek reduction of his sentence,  
15 but only injunctive relief. Therefore, the Court is not persuaded  
16 that the motion should be denied based on prejudice to Plaintiff.

17 II. Res Judicata

18 State law governs the issue of whether to afford state court  
19 judgments res judicata effect. 28 U.S.C. § 1738; Eichman v.  
20 Fotomat Corp., 759 F.2d 1434, 1439 (9th Cir. 1985). In California,  
21 a valid final judgment on the merits precludes parties or their  
22 privies from relitigating the same cause of action. Mycogen Corp.  
23 v. Monsanto Co., 28 Cal. 4th 888, 896 (2002). Whether two causes  
24 of action are the same for purposes of res judicata is determined  
25 through application of the "primary rights" theory. Le Parc  
26 Community Ass'n v. Workers' Compensation Appeals Bd., 110 Cal. App.  
27 4th 1161, 1170 (2003). Under that theory, the invasion of one  
28 primary right gives rise to a single cause of action. Id. "If two

1 actions involve the same injury to the plaintiff and the same wrong  
2 by the defendant then the same primary right is at stake even if in  
3 the second suit the plaintiff pleads different theories of  
4 recovery, seeks different forms of relief and/or adds new facts  
5 supporting recovery." Id. Res judicata applies not only to those  
6 claims actually litigated, but also to those which could have been  
7 litigated as part of that cause of action in the prior proceeding.  
8 California Coastal Comm'n v. Superior Ct., 210 Cal. App. 3d 1488,  
9 1499 (1989); Tensor Gp. v. City of Glendale, 14 Cal. App. 4th 154,  
10 160 (1993) (if a matter is within the scope of the action, related  
11 to the subject matter and relevant to the issues, so that it could  
12 have been raised, the judgment is conclusive on it despite the fact  
13 that it was not pleaded; a party cannot withhold issues and  
14 litigate them in consecutive actions). A judgment is on the merits  
15 for purposes of res judicata if the substance of the claim is tried  
16 and determined. Johnson v. City of Loma Linda, 24 Cal. 4th 61, 77  
17 (2000). Even if all the threshold requirements are met, res  
18 judicata will not be applied if injustice would result or if the  
19 public interest requires that relitigation not be foreclosed.  
20 Citizens for Open Access to Sand And Tide, Inc. v. Seadrift Ass'n,  
21 60 Cal. App. 4th 1053, 1065 (1998).

22 Plaintiff does not dispute that he brought or could have  
23 brought in his state habeas petitions the constitutional violation  
24 claim that he asserts here or that Defendant is not in privity with  
25 the respondent in his state habeas actions. Instead, Plaintiff  
26 argues that because, in denying his habeas petitions, the  
27 California superior, appellate and supreme courts failed to mention  
28 specifically the claim of constitutional violation he makes here--

1 the arbitrary characterization of all murders as especially heinous  
2 -- the state habeas judgments are not final judgments on the merits  
3 as required for the application of res judicata. Plaintiff did not  
4 assert in the petition he filed in the superior court the  
5 constitutional violation he asserts here. He did raise the Board's  
6 parole determination practices in his petitions to the state  
7 appellate court and Supreme Court.

8 Claims of violations of federal constitutional rights may, of  
9 course, may be asserted in a state habeas case and courts have  
10 applied the principles of res judicata and collateral estoppel to  
11 bar litigation of these claims in subsequent civil rights  
12 complaints. See Silverton v. Department of the Treasury, 644 F.2d  
13 1341, 1346-47 (9th Cir. 1981) (barring § 1983 claim on collateral  
14 estoppel grounds because constitutional claims had been adjudicated  
15 in previous state habeas proceeding); Clement v. California Dep't  
16 of Corrections, 220 F. Supp. 2d 1098, 1108 (N.D. Cal. 2002)  
17 (applying res judicata to bar § 1983 claim based on judgment in  
18 previous state habeas petition), aff'd 364 F.3d 1148 (9th Cir.  
19 2004)). Because Plaintiff could have asserted his constitutional  
20 claim in the superior court petition and did not, that judgment  
21 acts as res judicata to bar litigating those claims here.

22 Furthermore, he actually did assert this claim in his habeas  
23 petitions to the appellate and supreme courts, so those judgments  
24 also create a res judicata bar. It is not necessary that the  
25 previous courts have addressed the claim specifically. Claims that  
26 have been brought and adjudicated, and even claims that could have  
27 been brought in the prior proceeding but were not, are barred.

28 Plaintiff cites cases in support of his argument that

1 constitutional claims are not barred by prior judgments unless they  
2 were actually litigated and decided on the merits in the previous  
3 habeas proceedings. However, all the cases he cites apply the  
4 doctrine of collateral estoppel. See e.g., Jackson v. Official  
5 Representatives and Employees of Los Angeles Police Dep't, 487 F.2d  
6 885, 886 (9th Cir. 1973) (applying collateral estoppel); Silverton,  
7 644 F.2d at 1347 (applying collateral estoppel); Harris v. Jacobs,  
8 621 F.2d 341, 343 (9th Cir. 1980) (same). Collateral estoppel and  
9 res judicata both bar subsequent litigation but they are different  
10 doctrines. Collateral estoppel, sometimes called issue preclusion,  
11 bars the relitigation of issues actually adjudicated and  
12 necessarily determined in previous litigation between the same  
13 parties. Kamilche Co. v. United States, 53 F.3d 1059, 1062 (9th  
14 Cir. 1995), opinion amended on other grounds, 75 F.3d 1391 (1996);  
15 Montana v. United States, 440 U.S. 147, 153 (1979). As stated  
16 above, res judicata, sometimes called claim preclusion, bars the  
17 relitigation of claims that were brought or could have been brought  
18 in previous litigation. Therefore, Plaintiff's collateral estoppel  
19 cases are inapplicable here.

20 Plaintiff argues that Wilkinson v. Dotson, 544 U.S. 74 (2005),  
21 and In re Lawrence, 44 Cal. 4th 1181, 1211, 1225 (2008), which were  
22 issued after Plaintiff's state petitions were decided,  
23 significantly changed the law affecting his rights such that res  
24 judicata should not apply. However, these cases do not affect  
25 Plaintiff's rights in this case. In Wilkinson, the Court held that  
26 state prisoners could bring a § 1983 claim, as well as a § 2254  
27 claim, in federal court to challenge state procedures used to deny  
28 parole eligibility and suitability. 544 U.S. at 82. Wilkinson did



1 not address whether Plaintiff could have raised his federal  
2 constitutional claims in his state court habeas petitions. In  
3 Lawrence, the court held that the "some evidence" standard requires  
4 that the Board base its decision to deny parole on a finding that  
5 the inmate presents a current risk of dangerousness if released.  
6 44 Cal. 4th at 1221. In this civil rights case, Plaintiff is not  
7 challenging the Board's 2003 decision to deny him parole, but is  
8 challenging the constitutionality of the Board's general practices.  
9 Therefore, Plaintiff's argument that res judicata does not apply  
10 due to significant changes in the law fails.

11 CONCLUSION

12 For the foregoing reasons, the Court grants Defendant's motion  
13 for summary judgment on the ground that res judicata bars the  
14 litigation of Plaintiff's civil rights claims.

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16 IT IS SO ORDERED.

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18 Dated: September 29, 2009



19 CLAUDIA WILKEN  
20 United States District Judge  
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